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United Kingdom: Merger Control

Matthew O'Regan and Marc Shrimpling
Burges Salmon LLP

In this article, we review the main jurisdictional, procedural and substantive developments in UK merger control in the past 12 months. We also look forward to institutional and procedural changes that will take effect on 1 April 2014 when a new authority, the Competition and Markets Authority (CMA), will replace the Office of Fair Trading (OFT) and Competition Commission (CC).

Overview

The OFT and CC have maintained a high level of activity in merger control, with a considerable increase in both the number of mergers being referred by the OFT to the CC and those in which it accepts remedies in lieu of a referral.[1] This could be seen as the OFT investigating more aggressively or, perhaps, exercising greater caution in referring mergers to the CC. However, a likelier explanation is that increasingly complex mergers are being attempted in already concentrated markets, which also results in extended review timetables and greater use of 'stop the clock' powers.

Merger notification remains voluntary in the UK and there is no obligation to await clearance before closing a transaction. However, if prior clearance is not sought, the purchaser takes the risk of OFT and CC enforcement action. The OFT is proactive in identifying and investigating non-notified mergers, many of which are in small, often local, markets. Of the 19 mergers referred to the CC by the OFT in 2012 and 2013, 13 were completed mergers, with the CC prohibiting two completed mergers (*Eurotunnel/SeaFrance*[2] and *Stericycle/Ecowaste*[3]) and requiring very significant divestments in a third, *VPS/Sitex Orbis*.[4] The CC is currently investigating three further completed mergers, one of which, *Imerys/Goonvean*, has resulted in an apparent merger to monopoly in several narrow markets for different grades of china clay.[5] The OFT has also required remedies in several other completed mergers.

The authorities' substantive focus remains on unilateral effects, in particular the risk of post-merger price increases arising from the parties being 'close' competitors. This has led to increased analysis of financial and other economic data. The OFT and CC have also investigated coordinated effects, vertical foreclosure and conglomerate concerns: in *Anglo American/Lafarge*, the CC required substantial divestments to resolve concerns that a joint venture increased the risk of coordinated conduct in the cement market.[6] The OFT has been reluctant to apply both the 'failing firm' defence and the 'de minimis' exception to its duty to refer mergers to the CC. When competition concerns are identified, both authorities have demonstrated a clear preference for divestment remedies and have often required an 'upfront buyer'.

The OFT and CC cooperate with other competition authorities, but are prepared to act against multi-jurisdictional mergers that harm competition in the UK. The CC accordingly prohibited two mergers between foreign parties, *AkzoNobel/Metlac*[7] and *Eurotunnel/SeaFrance*,[8] despite each being approved by other competition authorities.

The Competition Appeal Tribunal (CAT), which hears appeals against OFT and CC merger decisions, handed down judgments in two appeals the *Ryanair/Aer Lingus* saga, providing important guidance on the relationship between UK merger law and the EU Merger Regulation (EUMR); both were upheld by the Court of Appeal.[9] In *SCRL*, the CAT also provided clarification of the CC's powers to impose remedies[10] and in *AkzoNobel*, it clarified the CC's power to impose remedies on companies incorporated outside the United Kingdom.[11]

Jurisdiction: what is a 'merger'?

Under the Enterprise Act 2002, the OFT has the jurisdiction to investigate 'relevant merger situations', which exist where two or more enterprises cease to be distinct and the jurisdictional thresholds are met.

There are two alternative jurisdictional thresholds: either the UK turnover of the acquired enterprise exceeds £70 million (the 'turnover' test) or the parties' have a combined share of over 25 per cent in the supply of goods or services in the UK or a substantial part of it, provided there is an increment in that share (the 'share of supply' test).

The turnover test is straightforward to apply. However, the OFT can and routinely does apply the share of supply test flexibly to assert jurisdiction, particularly in the case of non-notified mergers. It applies the test to very narrow descriptions of goods or services and often in very small geographic areas (for example, the supply of private hire vehicles for corporate account customers in London[12] or of online travel search services to UK-based customers and online advertising services to UK-based hotels[13]). The OFT is not limited to finding competition concerns in only those parts of the UK used to apply the share of supply test: in *Vue/Apollo*, the combined share of cinemas in Greater London was over 25 per cent, but the OFT found competition concerns only in four areas outside of London.[14]

Enterprises 'cease to be distinct' where they come under common control. There are three levels of control:

- a majority shareholding (legal control);
- control of the policy of an enterprise (de facto control); and
- the ability to influence the policy of an enterprise (material influence).

Material influence is a highly flexible concept that can sometimes be enjoyed with a shareholding of as little as 15 per cent and can even exist in the absence of any shareholding if one enterprise is economically dependent on the other.[15]

A change in the nature of control is covered by UK merger law: in *AkzoNobel/Metlac*, AkzoNobel had an existing 49 per cent interest in Metlac and an additional 44 per cent interest in its operating subsidiary, giving it a 71 per cent economic interest in, but not sole control of, Metlac. It sought to exercise a call option to increase to 100 per cent its shareholding in Metlac; as the transaction would

have changed AkzoNobel's shareholding from material influence to a controlling interest, it constituted a merger under UK law.

The concept of an 'enterprise' is also given a wide meaning; in some circumstances, even the purchase of assets from a business in administration or liquidation can constitute a merger. In *Eurotunnel/SeaFrance*, the CC found that the acquisition of three ferries formerly belonging to the bankrupt ferry line, SeaFrance, was a merger, despite Eurotunnel not acquiring a trading business. It reached this view because the ships were suitable for operations on the Dover–Calais route and had been quickly returned to service; most of the crews had formerly been employed by SeaFrance and were members of the workers cooperative that had acted with Eurotunnel to acquire the ferries and operate them on Eurotunnel's behalf; and, in bidding for the ferries, Eurotunnel had ascribed value to SeaFrance's brands, goodwill and customer lists, even though it did not acquire customer contracts.[16] By contrast, in *Shell/Greenergy/Vopak/Petroplus*, the OFT concluded that the acquisition of assets at the former Petroplus Coryton refinery, which had ceased operations, was not a merger, as the acquired assets did not constitute an enterprise:[17] the former refinery was non-operational and not supplying customers, and would require significant investment, work and time to be recommissioned as a storage terminal, as the purchasers intended. Therefore, the acquired assets, which did not include goodwill, customer contracts or commercial employees, were not a business.

The award of a contract can, in some cases, amount to a merger. In *AEG/Wembley Arena*,[18] the award of a management contract for an entertainment venue was a merger, as the acquiring party took over services previously provided to the venue by another operator, together with its staff and assets.

Jurisdiction: relationship between UK and EU merger control

The OFT does not have jurisdiction to review a merger that falls within the exclusive jurisdiction of the European Commission (Commission) under the EUMR. The relationship between UK and EU merger control was considered by the CAT and, on appeal, by the Court of Appeal, in separate challenges to OFT and CC investigations into Ryanair's 29.82 per cent shareholding in competing airline Aer Lingus. Ryanair had acquired this shareholding in 2007 as part of its first failed public bid to acquire Aer Lingus. Although the Commission prohibited this bid,[19] it refused to require Ryanair to divest its shareholding: these two decisions were subsequently upheld by the EU General Court.[20]

Following the General Court's judgments (which were not appealed by Ryanair or Aer Lingus), the OFT started investigating the acquisition of the minority shareholding. Rejecting Ryanair's challenge to the OFT's jurisdiction, the Court of Appeal confirmed that the OFT was within the four-month time limit to investigate a completed merger, as this limit started to run only once the time for appeals against the EU General Court's judgment expired in September 2010.[21] The Court of Appeal held that the OFT could not have investigated the minority shareholding until proceedings under the EUMR, including any appeals to the EU courts, had been concluded: to have done so would have infringed the Commission's exclusive jurisdiction and created a risk of conflicts and inconsistencies between the UK and EU proceedings. The OFT was therefore obliged to avoid both overlapping jurisdictions and inconsistent decisions: concurrent Commission and OFT investigations would have been 'both oppressive and mutually destructive'.

In June 2012, the OFT subsequently referred Ryanair's completed acquisition of its minority shareholding in Aer Lingus to the CC.[22] Days later, Ryanair announced a further public bid for Aer Lingus, which was notified to the Commission under the EUMR (and subsequently prohibited by it in February 2013).[23] The CC continued its investigation despite the Commission's review of the new public bid, and Ryanair challenged the CC's jurisdiction to do so. The Court of Appeal confirmed the CAT's rejection of Ryanair's challenge;[24] the minority shareholding did not form part of the concentration being considered by the Commission (which was to acquire the outstanding Aer Lingus shares that Ryanair did not already own). Therefore, the CC's jurisdiction to review the minority shareholding was distinct from, and independent of, the Commission's jurisdiction over the public bid. The CC could therefore continue its investigation, although it could not reach any decision that would be contrary to any that the Commission might have reached.

On 27 February 2013, the Commission prohibited Ryanair's further public bid and, shortly thereafter, the CC restarted its investigation into the acquisition of the minority shareholding. On 30 May 2013, it announced its preliminary finding that the acquisition of the minority shareholding had led to a reduction in competition between the two airlines and that Ryanair should be required to reduce, wholly or partly, its shareholding.[25]

Procedural issues and interim measures

The increasing complexity of merger reviews has resulted in an increased use of both time extensions and 'stop the clock' measures when merging parties fail to provide information and documents required by the OFT and CC.

The OFT increasingly requests that the parties do not use or withdraw a merger notice (for which a statutory timetable of a maximum of 30 working days applies)[26] and frequently misses its non-binding target of completing reviews of mergers that are not notified using a merger notice within 40 working days.[27] For example, in *London Stock Exchange Group/LCH.Clearnet*, the OFT's review lasted over four-and-a-half months, thus allowing it sufficient time to undertake a complex investigation and give unconditional Phase I clearance.[28]

The CC has sometimes used its statutory powers to extend its 24-week review period to 32 weeks: in *Eurotunnel/SeaFrance*, the CC extended its review by eight weeks due to the scope and complexity of its investigation, in particular the assessment of possible remedy options. In *Ryanair/Aer Lingus*, its review was suspended for several months while Ryanair unsuccessfully challenged the CC's jurisdiction. In *NHS Foundation Trusts*, the CC suspended its investigation for 63 days after the parties failed to respond fully to statutory notices to produce information and documents.[29]

The Enterprise Act does not contain a 'standstill' obligation and many mergers are completed before being notified to or investigated by the OFT. Steps taken by the merging parties to integrate their businesses may make it difficult for the OFT and CC to impose effective remedies. Therefore, in completed mergers, the OFT and CC routinely use powers to require acquiring parties to 'hold separate' the two businesses, preventing their further integration without the OFT or CC's consent.

Among other procedural developments have been the publication by the CC of new procedural guidance,[30] setting out how it will investigate mergers (although its life will be limited with the forthcoming establishment of the CMA, which will publish its own guidance) and a significant increase in the fees payable by merging parties to a possible maximum of £160,000 where the target has a UK turnover of over £120 million.[31]

OFT referral practice and exceptions to its duty to refer a merger to the Competition Commission for detailed review

The OFT is under a duty to review any merger that is notified to it or of which it otherwise becomes aware. As a 'first stage screen', the OFT is not required to definitively determine if a merger will lead to a substantial lessening of competition; that is for the CC to decide. The OFT must refer a merger to the CC if it holds a reasonable and objectively justified belief that there is a plausible prospect that it may substantially lessen competition.[32] The OFT is therefore cautious in referring mergers to the CC for a second phase investigation. This is borne out by the fact that in 2012 and 2013, the CC unconditionally cleared five of the 13 mergers in respect of which it had reached a final decision. The only exceptions to the OFT's duty to refer are where the market is of 'insufficient importance' to justify a referral (the so-called 'de minimis' exception)[33] or has countervailing customer benefits. The OFT can also accept remedies in order to approve a merger without a CC reference: these are known as 'undertakings in lieu'.

The OFT has been cautious in using the de minimis exception. Many potentially de minimis mergers have concerned the bus sector, which inherently affect local markets and may give rise to specific issues.[34] In 2012, the OFT referred two mergers (*McGill's/Arriva Scotland West*[35] and *Stagecoach/First North Devon*[36]) to the CC even though the affected markets were considerably under the £3 million threshold, below which there will not usually be a referral; the former merger was subsequently approved unconditionally, while the latter was abandoned. In *Arriva Midlands North*, the OFT did not refer because the markets were less than £1 million in size, the loss of competition was small (even though the merger created a monopoly on some overlapping routes) and the merger potentially created a stronger competitor to a large incumbent in an adjoining area.[37] Similarly, in *Greater Manchester Buses*, a referral was not made as the section of route on which competition was eliminated was short and of very limited size.[38] In *Intercontinental Exchange/APX-ENDEX*, the OFT used the de minimis exception to approved unconditionally a merger of two energy futures exchanges and clearing houses, despite a combined share of 70–80 per cent in the Europe-wide market for trading services for Dutch natural gas futures: the UK market was just under £3 million, market entry was possible (such that the OFT's competition concerns and the risk of price increases were low) and the impact on UK consumers was limited.[39]

In *NHS Foundation Trusts*, the OFT made a referral despite the parties claiming that the merger would have countervailing customer benefits.[40] The OFT (acting with the advice of the health services regulator, Monitor) found that most of the claimed benefits had not been substantiated and those that had been were limited to certain services, whilst the merger would have led to a loss of competition across numerous clinical and other medical services.

Substantive analysis: continuing focus on unilateral effects analysis, but coordinated effects and vertical foreclosure concerns not forgotten

The principal focus of both the OFT and the CC has been on unilateral effects and whether post-merger price rises are likely as a result of the loss of competition between the merging parties. The OFT has found unilateral effects concerns on very narrow markets, often of a local nature, including: bus routes,[41] cinemas,[42] petrol stations[43] and grocery stores[44] in specific towns.

The CC has also identified local concerns in the casino sector, in areas where there would remain insufficient actual or potential competition and high regulatory barriers to entry, although it did dismiss coordinated effects concerns.[45] It also reached similar conclusions due to a loss of rivalry in the commercial radio sector in certain towns.[46]

However, the CC has dismissed concerns that mergers damage local competition in other cases, including in:

- cash-and-carry wholesaling, due to there being sufficient alternative national or regional cash-and-carry operators, as well as operators who delivered directly to retailers;[47]
- local bus services in Renfrewshire, due to the credible threat of entry by major national operators with extensive operations in nearby Glasgow constraining any increase in fares;[48] and
- oil distribution, due to the existence of alternative suppliers and low barriers to entry.[49]

In *Epwin/Latium*, the CC unconditionally approved a merger of two suppliers of building products, as customers could switch (or threaten to switch) to rivals with spare capacity should the merged entity have sought to have increased prices.[50]

In *BARR/Britvic*, unilateral concerns led the OFT to refer the merger to the CC,[51] despite the merged entity remaining considerably smaller than the market leader in carbonated soft drinks, Coca-Cola. The OFT used survey evidence and financial data (including variable profit margins and diversion ratios) to compute a gross index of upward pricing pressure (GUPPI) for each of the parties' brands, concluding that the loss of competitive constraints between the parties could have given them the incentive to increase prices. However, the CC subsequently cleared the merger unconditionally; consumers saw the parties' brands as distinct with low levels of substitution, which was confirmed by consumer surveys and econometric modelling which found that diversion ratios were limited.[52]

In *Cineworld*, a merger of cinema operators was referred to the CC. Despite differentiated offerings, there was evidence the parties competed to attract audiences, particularly in towns and cities where there were limited alternatives and there was a significant overlap in the film genres that they exhibited. In doing so, the OFT undertook econometric modelling to calculate GUPPI indices.

In *Thomson Reuters*, the OFT cleared the merger of two large providers of legal publications and information services, Thomson Reuters and PLC, in a market with only one other large supplier, LexisNexis. Unilateral effects concerns were ruled out, as there was limited actual competition between the parties (whose products were significantly complementary and each competed mainly with LexisNexis) and there was no evidence that either would have expanded its activities to compete with the other.

The CC has found unilateral effects in several recent mergers. In *Eurotunnel/SeaFrance*, it found that Eurotunnel (the Channel Tunnel operator) had acquired the SeaFrance vessels to launch its own Dover–Calais ferry service and thereby prevent a rival, DFDS/LD Lines, becoming a credible competitor and potentially forcing DFDS/LD Lines' exit in a market with significant over-capacity. This could have led to longer-term price increases by Eurotunnel and the other remaining ferry operators. In *AkzoNobel/Metlac*, the CC identified a substantial lessening of competition in the market for the supply of metal packaging coatings for beer and beverage cans, in which the parties' combined UK share of supply was over 60 per cent and customers' ability to switch supplier was limited. The merger would therefore have led to price increases, which customers could not have prevented, as well as to a loss in competition in innovation.

The CC is also undertaking its first review of a merger between publicly-owned acute general hospitals. The principal concern is a loss of patient choice in relation to a range of different clinical, specialist and community and outpatient services, and not a loss of price competition, since National Health Service treatment is free to patients.[53] By contrast, in a merger of two neurosurgery units in London, the OFT did not identify any competition concerns as there remained sufficient alternative providers of neurosurgery services in the London area.[54]

The authorities have also investigated both coordinated effects and vertical foreclosure concerns in other cases. In *Anglo American/Lafarge*, the CC required a very extensive divestment package to be implemented in order to resolve concerns that a joint venture would have increased the risk of coordination in the cement market.[55] In *London Stock Exchange/LCH.Clearnet*, the OFT concluded that the merged entity had no incentive to foreclose rival providers of clearing services or electronically traded derivatives, and that any foreclosure would have been unlikely to have had significant effects on competition. The OFT eliminated the possibility of coordinated effects, foreclosure and conglomerate effects (from bundling or tying products) in *Priceline.Com/Kayak*, a merger of two US companies which operated online travel agencies and price comparison sites, respectively. Coordinated effects and bundling concerns were also ruled out in *Thomson Reuters/PLC* as bundling would not have eliminated LexisNexis from the market and, as pricing was negotiated individually with each customer, coordination with LexisNexis was unlikely.

In *Ryanair/Aer Lingus*, the OFT[56] and CC have considered how the acquisition of a minority shareholding in a competitor can harm competition. The CC has provisionally found that, notwithstanding competition between the airlines, Ryanair has used its shareholding to influence Aer Lingus' commercial policy and strategy, in particular to prevent it merging with another airline (to generate economies of scale and synergies) and raising capital, which has reduced competition as compared to that which could have been expected in the absence of the shareholding.[57]

The OFT has provided further guidance on the applicability of the 'failing firm' defence, which it has continued to apply very narrowly. It refused to apply the defence in *University College London Hospitals NHS Foundation Trust*: although the target's neurosurgery unit may have been too small to remain viable and safe for patients, its closure was not inevitable and it could have been transferred to another hospital that would have raised fewer competition concerns. In *Stagecoach/First North Devon*, despite evidence that First intended to close its loss-making business in North Devon absent the merger (as indeed subsequently happened), the OFT refused to apply the defence: First had not marketed the business to any other possible purchaser and, therefore, the OFT was not satisfied that there were no possible less anti-competitive purchasers, given three operators had expressed an interest to the OFT.

Remedies

As an alternative to referring a merger to the CC, the OFT can accept 'undertakings in lieu' offered by the merging parties. To be accepted, these need to be a clear-cut solution to the OFT's competition concerns. Where the CC prohibits a completed merger, it will also need to impose remedies to restore the market to competition.

Both authorities have a clear preference for structural remedies, particularly divestments, which have recently ranged from a single petrol station in a small Welsh town[58] to a package comprising one of the UK's largest cement plants and various other quarries, ready mix concrete and asphalt plants.[59]

In 2012, the OFT cleared eight mergers by accepting undertakings in lieu. Four further mergers have been approved on this basis in 2013. To resolve competition concerns in local markets, the OFT requires the divestment of particular overlapping business premises, as a going concern, to restore the pre-existing number of independent 'fascia'. It has done so in sectors including grocery retailing,[60] cinemas,[61] electrical wholesaling,[62] builders merchants[63] and dental services.[64]

In *Cineworld/City Screen*, remedies were rejected by the OFT as the parties offered to divest cinemas in only two of the five areas in which the OFT identified competition concerns and the remedies were thus neither comprehensive nor clear cut. In *Nakano* (which combined the UK's two leading vinegar manufacturers, leading to a monopoly in some segments), the OFT rejected a proposal to supply volumes of unbranded vinegar to third parties: this was not clear cut, could have led to coordination between vinegar suppliers and would not have restored long-term competition.[65]

A notable feature has been the OFT's extensive use of upfront buyers: in six of the OFT's remedies decisions in 2012, it required an upfront buyer to be found and approved by it. In both anticipated and completed mergers, this means that only once a buyer has been approved will the OFT accept the parties' undertakings and until that time it can still refer the merger to the CC.[66] Although in *Nakano*, the OFT rejected a supply remedy, it did accept a remedy to divest Nakano's own vinegar plant, but the OFT required an upfront buyer with expertise in the industry because the number of possible buyers was low. In *Boparan*, the OFT accepted a remedy to divest either party's Christmas pudding business; an upfront buyer was required because of concerns over the implementation of the remedy, which did not necessarily include the transfer of the actual production site and employees.[67]

The OFT also required upfront buyers in *Vue/Apollo* (cinemas)[68] and *Rexel/Wilts* (electrical distribution),[69] as some of the divested outlets were loss-making, so increasing the risk of there being no appropriate purchaser. In *Edmundson/Electrical Center*, an upfront buyer was required as no potential purchasers had been identified and two of the stores were not stand-alone premises, thus increasing the risk of a failed divestment.[70] In a further case, the OFT required an upfront buyer in part because of its lack of experience in divestments in the dental services market.[71]

Remedies can effectively result in the unwinding of a merger that has already been completed. In *VPS/Sitex Orbis*,[72] the CC required that the purchaser divest itself of the target's entire business in Great Britain. In *Eurotunnel/SeaFrance*, the CC could not require the divestment of the vessels acquired by Eurotunnel as the French bankruptcy court supervising SeaFrance's liquidation had prohibited Eurotunnel from selling the vessels until 2017. Instead, the CC prohibited Eurotunnel from operating on the Dover–Calais ferry route.

In *Stericycle/Ecowaste*,[73] the CC required the complete divestment of Ecowaste's business, which Stericycle had integrated into its own business. The CC rejected a partial divestment under which Stericycle would have retained some of Ecowaste's customer contracts. Until the remedy was implemented, Stericycle was prohibited from bidding for new contracts in the area served by Ecowaste's waste treatment plant. The CAT upheld this remedy,[74] confirming that the CC is entitled to find that a complete divestment is an appropriate and proportionate remedy if lesser remedies are insufficient to restore competition. The CAT also confirmed that the CC

is entitled to reject behavioural remedies, to set a deadline for the remedy to be implemented and to require the divestment to be made by a trustee if the parties fail to do so within this deadline.

In *AkzoNobel/Metlac*, the CC rejected proposed behavioural remedies (including an undertaking not to increase the prices at which Akzo and Metlac currently supplied to UK customers for a certain period) and prohibited the merger. In *Rank/Gala*,[75] it permitted the merger on condition that four Gala casinos were not included in the transaction; a fifth could be included only if Rank first sold, to an approved buyer, its licence to open a casino in Edinburgh, in order to restore potential competition in that city.

In both *AkzoNobel/Metlac* and *Eurotunnel/SeaFrance*, the CC imposed remedies on foreign purchasers, rejecting arguments that the CC could not enforce those prohibitions on the basis that they were foreign companies that did not themselves carry on business in the UK: both did so, through subsidiaries controlled by them. In *AkzoNobel*, the CAT upheld the CC's order prohibiting AkzoNobel from acquiring shares in Metlac: AkzoNobel (which was a holding company for its group and the acquiring party) did carry on business in the UK, through the businesses of its functional units whose strategy was determined centrally by AkzoNobel.[76]

In *Anglo American/Lafarge*, the CC imposed an upfront buyer requirement in a substantial divestment that included one of Britain's largest cement works, together with several quarries, rail depots, ready-mix concrete plants (representing more than half the parties' pre-merger capacity), aggregates quarries and Anglo's shares of quarries, rail depots and asphalt plants operated by it and a competitor in a joint venture. This remedy was required to ensure the entry of a new entrant with sufficient scale to ensure competition and reduce the risk of coordinated behaviour in the highly concentrated cement market, as well as in the markets for rail ballast, high-purity limestone and (in various local markets) primary aggregates, asphalt and ready-mix concrete.

Significant institutional and procedural change ahead: the Competition and Markets Authority

In March 2012, the UK Government announced significant reforms to the UK competition law regime, including in relation to merger control.[77] These have been given effect through the Enterprise and Regulatory Reform Act, which received Royal Assent on 25 April 2013.

The principal change for the competition regime as a whole is the creation of a new competition authority, the CMA. The CMA will assume the OFT's competition functions and all the functions of the CC: the OFT and CC will be abolished.[78] The CMA will be established in October 2013 and commence its work on 1 April 2014. The OFT and CC will publish, for consultation, draft procedural and substantive guidance that will later be adopted by the CMA.

The Enterprise and Regulatory Reform Act will make a number of significant procedural changes to UK merger law, including in respect of the CMA's investigation powers, interim measures and time limits.[79]

The CMA will retain the existing two-stage review process and continue to apply the existing substantive test of whether a merger will substantially lessen competition. It will have new decision-making procedures: Phase I decisions will be taken by the CMA Board and Phase II decisions by an independent panel of experts.

A fixed timetable will apply to all mergers reviewed by the CMA, although it will retain 'stop the clock' powers, which can be expected to be widely used to ensure that the new timetable can be met. Phase I will last 40 working days, with a new procedure thereafter for negotiating and agreeing remedies. The Phase II review will remain at 24 weeks, extendable to 32 weeks. New remedy procedures will also be introduced in Phase II, with the CMA having a further 12 weeks to agree or impose remedies. The new remedy procedures are intended to remove the existing regime's perceived procedural unfairness: remedies will be negotiated only once the CMA has set out the grounds for a Phase II review or, in a Phase II procedure, once it has found that the merger will substantially lessen competition.

The CMA's enhanced procedural powers will include the power to:

- require the attendance of witnesses and the production of documents in both Phases I and II;
- impose hold separate measures in relation to both completed and anticipated mergers, including orders to reverse any integration steps already taken; and
- impose financial penalties (up to 5 per cent of turnover) for failing to comply with interim measures orders.

Notes

1 Prior to 31 March 2013, the OFT adopted decisions in respect of 100 mergers, of which 14 were referred to the CC for an in-depth investigation and a further 10 cases required remedies. See OFT Merger Statistics, available at www.oft.gov.uk/shared_oft/mergers_ea02/webstats.pdf. In the period to 19 June 2013, the OFT adopted a further 16 merger decisions, referring two to the CC and, at that date it was reviewing a further 13 mergers. At the CC level, in 2012 and the first five months of 2013, the CC completed investigations into 12 mergers, clearing five unconditionally, approving four subject to remedies and prohibiting three, two of which had been completed. In addition, it approved one merger unconditionally under the special regime applicable under the Water Industry Act 1991 to mergers between water companies. At 19 June 2013, the CC was investigating a further six mergers.

2 *Groupe Eurotunnel/SeaFrance*, Competition Commission final report of 6 June 2013. On 18 June 2013, Eurotunnel brought, in the CAT, an appeal against the CC's decision, challenging both the CC's finding of a substantial lessening of competition and the remedy imposed by it: *Groupe Eurotunnel v Competition Commission*. On 3 July 2013, the worker cooperative that had bid together with Eurotunnel brought its own challenge: *Société Coopérative de Production Sea France v Competition Commission*. The appeals will be heard on 10 September 2013.

3 *Stericycle/Ecowaste*, Competition Commission final report of 21 March 2012.

4 *VPS/Sitex Orbis*, Competition Commission final report of 17 August 2012.

5 *Imerys/Goonvean*, OFT decision of 3 April 2013.

6 *Anglo American/Lafarge*, Competition Commission final report of 1 May 2012.

7 *AkzoNobel/Metlac Holdings*, Competition Commission final report of 21 December 2012. The transaction was approved by competition authorities in Austria, Brazil, Colombia, Cyprus, Germany, Pakistan, Russia and Turkey. AkzoNobel's appeal was dismissed by the CAT: *AkzoNobel v Competition Commission* [2013] CAT 13.

8 *Eurotunnel/SeaFrance*, supra, note 2. This transaction had been conditionally approved, subject to behavioural remedies, by the French Autorité de la Concurrence: see press release, The Autorité de la concurrence clears, subject to conditions, the acquisition of certain SeaFrance assets by the Eurotunnel Group (8 November 2012). Eurotunnel has appealed: see supra, note 2.

9 *Ryanair Holdings v Office of Fair Trading* [2012] EWCA (Civ.) 643 and *Ryanair Holdings v Competition Commission* [2012] EWCA (Civ.) 1632. In both cases, Ryanair was refused permission to appeal to the Supreme Court.

10 *SCRL v Competition Commission* [2012] CAT 14.

11 *AkzoNobel v Competition Commisison*, supra, note 7.

12 *Addison Lee/Lewis Day Transport*, OFT decision of 20 February 2012 (share of supply test not satisfied).

13 *Priceline.Com/Kayak Software Corporation*, OFT decision of 9 May 2013 (share of supply test satisfied).

14 *Vue Entertainment/Apollo Cinemas*, OFT decision of 24 August 2012.

15 *Eurotunnel/SeaFrance*, supra, note 2: Eurotunnel had material influence over an employee-owned cooperative (with which it had bid for the three former SeaFrance vessels and whom it engaged to operate the vessels on its behalf) as the cooperative was economically dependent on it, including for finance, revenues and long-term capacity commitments.

16 Although Eurotunnel has appealed the CC decision (*Groupe Eurotunnel v Competition Commission*, supra, note 2), it has not challenged the finding that the transaction was a relevant merger situation. However, the employee-owned cooperative has done so: *SCOP v Competition Commission*, supra, note 2.

17 *Shell UK/Greenergy International/Vopak/assets of Petroplus Refining and Marketing*, OFT decision of 24 May 2013.

18 *AEG Facilities/Contract to manage Wembley Arena*, OFT decision of 22 March 2013.

19 Case M.4439 *Ryanair/Aer Lingus*, European Commission decision of 27 June 2007.

20 Case T-342/07 *Ryanair v European Commission* [2010] ECR II-3457 (in relation to Ryanair's challenge to the prohibition decision) and Case T-411/07 *Aer Lingus v European Commission* [2010] ECR II-3691 (in relation to the Commission's refusal to order Ryanair to divest the minority shareholding).

21 *Ryanair v Office of Fair Trading*, supra, note 9.

22 *Ryanair/Aer Lingus*, OFT decision of 15 June 2012.

23 Case M.6663 *Ryanair/Aer Lingus III*, European Commission decision of 27 February 2013. The Commission's prohibition decision is under appeal: Case T-260/13 *Ryanair Holdings v European Commission*, pending.

24 *Ryanair Holdings v Competition Commission*, supra, note 9.

25 See Competition Commission press release, Ryanair may have to reduce its stake in Aer Lingus (30 May 2013).

26 See OFT, Mergers: Jurisdictional and procedural guidance (OFT 527, June 2009), paras 4.49 et seq. A merger notice may be used only in respect of a merger that has not been completed.

27 Ibid, paras 4.63 et seq. The non-binding timetable applies to mergers notified using an informal submission and to those which are not notified to the OFT, but which it investigates on an own-initiative basis.

28 *London Stock Exchange Group/LCH.Clearnet Group*, OFT decision of 14 December 2012. The OFT's review included engagement with a large number of third parties, including industry participants and regulatory agencies in the UK. The OFT objected to a request by the merging parties under Article 4(5) EUMR that the merger, which did not satisfy the EUMR thresholds, be reviewed by the Commission: it thus fell be reviewed by the OFT, as well as the Spanish and Portuguese authorities, with whom the OFT cooperated in its own investigation.

29 *Poole Hospital NHS Foundation Trust/ Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust*: notice of termination of extension of inquiry period (11 June 2013).

30 Competition Commission, Merger Procedural Guidelines (CC18, October 2012). In its revised guidance, the CC sets out how it gathers information, develops its assessment, seeks views, examines and implements remedies. It also sets out an indicative investigation timetable, which is split into three key stages: weeks one to six are for information gathering; weeks seven to 15 are for the CC's assessment of the evidence and hearings with the parties; and weeks 16 to 24 are for the publication of, submissions on and hearings concerning the CC's provisional findings and (if relevant) proposed remedies. Depending on the particular circumstances of each investigation, these steps may sometimes overlap or occur in a different order.

31 Enterprise Act 2002 (Merger Fees) (Amendment and Revocation) Order 2012. The fees are based on the UK turnover of the target company: £40,000 (where target's UK turnover is £20 million or less); £90,000 (between £20 million and £70 million); £120,000 (between £70 million and £120 million); and £160,000 (over £120 million). The fee is payable in respect of all mergers investigated by the OFT, except if the OFT determines that a merger does not qualify for investigation by it.

32 *Office of Fair Trading v IBA Health* [2004] EWCA (Civ.) 142.

33 OFT, Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance (OFT 1122, December 2010). According to this guidance, the OFT will generally not refer a merger to the CC if the affected markets have, in aggregate, turnover of less than £3 million, and may decide not to do so where the aggregate turnover is between £3 and £10 million. A reference will generally be made where the turnover is over £10 million.

34 In its market investigation into local bus services, the CC urged the OFT to exercise caution when using the de minimis exception in local bus cases: *Local Bus Services Market Investigation*, Competition Commission final report of 20 December 2011.

35 *McGill's Bus Service/Arriva Scotland West*, OFT decision of 18 April 2012.

36 *Stagecoach/North Devon business and assets of First Devon and Cornwall*, OFT decision of 10 July 2012.

37 *Arriva Midlands North/Lyell*, OFT decision of 21 January 2013.

38 *Greater Manchester Buses/Bluebird*, OFT decision of 22 February 2013.

39 *Intercontinental Exchange/APX-ENDEX*, OFT decision of 28 February 2013.

40 *Poole Hospital NHS Foundation Trust/Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust*, OFT decision of 8 January 2013.

41 *Greater Manchester Buses/Bluebird*, supra, note 38 (specific routes in north Manchester), *Arriva Midland North/Lyell*, supra, note 37 (specific routes in south Staffordshire) and *Stagecoach/North Devon business and assets of First Devon and Cornwall*, supra, note 36 (routes in North Devon).

42 *Vue Entertainment/Apollo Cinema*, supra, note 14, identifying competition concerns in four towns (undertakings accepted) and *Cineworld/City Screen*, OFT decision of 30 April 2013, identifying concerns in five areas (referred as insufficient undertakings offered).

43 *Shell/Rontec*, OFT decision of 3 February 2012 and *Rontec/Total*, OFT decision of 9 January 2012.

44 *Midcounties Co-operative/Harry Tuffin Investments*, OFT decision of 18 October 2012.

45 *Rank/Gala*, Competition Commission final report of 18 February 2013.

46 *Global Radio Holdings/GMG Radio Holdings*, Competition Commission final report of 21 May 2013. On 18 June 2013, Global Radio appealed this decision to the CAT, challenging both the findings of a substantial lessening of competition and the remedies imposed by the CC: *Global Radio Holdings v Competition Commission*.

47 *Booker/Makro*, Competition Commission final report of 10 April 2013.

48 *McGill's Bus Service/Arriva Scotland West*, Competition Commission final report of 21 September 2012.

49 *DCC Energy/Rontec Investments*, Competition Commission final report of 4 September 2012.
50 *Epwin/Latium*, Competition Commission final report of 13 November 2012.
51 *AG BARR/Britvic*, OFT decision of 13 February 2013.
52 *AG BARR/Britvic*, Competition Commission final report of 9 July 2013.
53 *Poole Hospital NHS Foundation Trust/Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust*, OFT decision of 8 January 2013. The CC investigation is ongoing, having been suspended for two months whilst the parties provided information and documents: see supra, note 29.
54 *University College Hospital London Hospitals NHS Foundation Trust/ Royal Free London NHS Foundation Trust's neurosurgery unit*, OFT decision of 21 February 2013.
55 *Anglo American/Lafarge*, supra, note 6.
56 *Ryanair/Aer Lingus*, OFT decision of 15 June 2012.
57 See press release, Ryanair may have to reduce its stake in Aer Lingus (30 May 2013). The CC is seeking views on possible remedies, which could require Ryanair to sell all or part of its shareholding.
58 *Rontec/Total*, supra, note 43.
59 *Anglo American/Lafarge*, supra, note 6.
60 *Midcounties Cooperative/Harry Tuffin Investments*, supra, note 44.
61 *Vue/Apollo*, supra, note 14.
62 *Edmundson Electrical/Electric Center*, OFT decision of 11 May 2012 and *Rexel/Wilts Wholesale Electrical*, OFT decision of 26 October 2012.
63 *Jewson/Build Center*, OFT decision of 8 February 2012.
64 *Carlyle and Palamon/Integrated Dental Holdings*, OFT decision of 26 April 2012.
65 *Nakano/Vinegar and pickles business of Premier Foods*, OFT decision of 26 September 2012.
66 Mergers: Jurisdictional and procedural guidance, supra, note 26, chapter 8.
67 *Boparan/RF Brookes Chilled Food and Avana Bakeries*, OFT decision of 19 March 2012.
68 *Vue/Apollo*, supra, note 14.
69 *Rexel/Wilts Wholesale Electrical*, supra, note 62.
70 *Edmundson Electrical/Electric Center*, supra, note 62.
71 *Carlyle and Palamon/Integrated Dental Holdings*, supra, note 64.
72 *VPS/Sitex Orbis*, supra, note 4.
73 *Stericycle/Ecowaste*, supra, note 3.
74 *SCRL v Competition Commission* [2012] CAT 14.
75 *Rank/Gala*, supra, note 45.
76 *AkzoNobel v Competition Commission*, supra, note 7. This finding does not form one of the grounds of appeal relied upon by Eurotunnel in its appeal against the CC's prohibition decision: *Groupe Eurotunnel v Competition Commission*, supra, note 2.
77 See Department for Business, Innovation and Skills, Growth, Competition and the Competition Regime: Government Response to Consultation (March 2012).
78 Enterprise and Regulatory Reform Act, ss. 25 – 28 and Schedule 4.
79 Enterprise and Regulatory Reform Act, ss. 29 – 32 and Schedules 7 and 8.

Matthew O'Regan
Burges Salmon LLP

Matthew O'Regan is a partner in the competition unit of Burges Salmon. He read law at the University of Nottingham and European Law at the University of Amsterdam. He qualified as a solicitor in 1997 and was a member of the Brussels Bar between 2001 and 2011, where he worked in the Brussels office of a leading international law firm.

Mr O'Regan's expertise covers a broad range of industry sectors. He advises and represents a broad range of British and international clients on all aspects of UK, EU and international competition law, both contentious and non-contentious.

He has obtained EU and UK merger clearances for numerous and often complex and multi-jurisdictional mergers, many of which have required negotiation and implementation of complex remedies. He has defended companies in EU and UK cartel, antitrust and dominance investigations, including obtaining leniency and successfully concluding investigations by negotiating commitments. He advises public bodies, beneficiaries and complainants in state aid proceedings before the European Commission. He has appeared as an advocate in several leading cartel and state aid cases before the EU courts, successfully obtaining significant reductions in fines and the annulment of conditions imposed by the Commission in state aid proceedings. He also conducts competition litigation and judicial review proceedings before the English High Court and the UK Competition Appeal Tribunal.

Mr O'Regan publishes and speaks on a wide range of subjects. He is a general editor of *Telecommunications, Broadcasting and the Internet: EU Competition Law and Regulation* (third edition, 2010), to which he contributed the chapters on market conduct and mergers.

Marc Shrimpling
Burges Salmon LLP

Marc Shrimpling is an associate in the competition unit of Burges Salmon. He read law with European law at the University of Oxford, which included a year studying at the University of Leiden in the Netherlands. He qualified as a solicitor in 2009, having trained with a leading international law firm in its London and Brussels offices. He is presently on secondment to the OFT, as a member of its policy group, drafting new legislation and guidance in advance of the CMA assuming the OFT's competition functions and the functions of the Competition Commission in 2014.

Mr Shrimpling combines his strong academic credentials in competition and state aid law with a broad range of experience across numerous industry sectors and all types of competition work. His recent merger work includes obtaining EU merger approval (subject to remedies) for the merger of Arla and Milk Link to create one of the largest global dairy cooperatives and successfully obtaining the revision by the Competition Commission of conditions imposed on bus and rail operator, FirstGroup, when it originally acquired the ScotRail franchise in 2004.

Mr Shrimpling's recent contentious competition work includes acting for the Co-operative Group in the OFT's investigation into alleged anti-competitive practices in the tobacco sector and subsequently successfully overturning the OFT's infringement decision and a substantial fine, on appeal, to the Competition Appeal Tribunal.

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 117 939 2000
Fax: +44 117 902 4400

6 New Street Square
London EC4A 3BF
Tel: +44 20 7685 1200
Fax: +44 20 7980 4966

Matthew O'Regan
matthew.o'regan@burges-salmon.com

Marc Shrimpling
marc.shrimpling@burges-salmon.com

www.burges-salmon.com

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